'The Andres Bonifacio'; Far East Oil Tanker SA v Owners of the Ship or Vessel 'Andres Bonifacio'

HIGH COURT (SINGAPORE) — ADMIRALTY IN REM NOS 254, 255 AND 256 OF 1989
KARTHIGESU J
15 MARCH 1991

Shipping and Navigation — Admiralty jurisdiction — Action in rem — Arrest of ship to enforce claim for breach of charterparty — Whether defendants liable in an action in personam — Beneficial ownership of arrested vessel — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), s 4(4)

Shipping and Navigation — Admiralty jurisdiction — Action in rem — Improper invocation of admiralty jurisdiction — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), s 4(4)

Civil Procedure — Admiralty practice and procedure — Setting aside arrest of vessel — Improper invocation of admiralty jurisdiction — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), s 4(4)

Words and Phrases — 'Beneficially owned' — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), s 4(4)

The plaintiffs were the owners of the 'Feoso Ambassador 2' which had been chartered to the defendants on two separate occasions. The plaintiffs commenced Admiralty in Rem Nos 254 and 255 of 1989 against the defendants' vessel, the 'Andres Bonifacio' to enforce their claims in respect of two voyages involving the 'Feoso Ambassador 2'. Feoso Ambassador SA commenced Admiralty In Rem No 256 of 1989 against the 'Andres Bonifacio' to enforce their claim arising from the charter of the vessel, 'Feoso Ambassador '.

On 17 October 1989, the plaintiffs arrested the 'Andres Bonifacio' in Admiralty in Rem No 254 of 1989. No arrests were made in Admiralty in Rem Nos 255 and 256 of 1989. Three days after the arrest of the 'Andres Bonifacio', the defendants, PNOC Oil Carrier Inc ('POCI'), obtained the release of the vessel by providing bail bonds in respect of the claims made in the three in rem suits. The defendants entered conditional appearance in all the three in rem suits. Subsequently, on 2 November 1989, the defendants applied by way of summons-in-chambers in all three in rem suits to set aside the service of the writ in rem and all proceedings in the three in rem suits. The defendants also applied for the cancellation of the bail bonds which had been given in the three in rem suits. Alternatively, the defendants sought for a reduction of the amount of the bail bonds which had been given in the three in rem suits. The defendants also filed a motion in Admiralty in Rem Suit No 254 of 1989 on 2 November 1989 to set aside the warrant of arrest and all subsequent proceedings in that suit on the ground that in view of the praecipe for caveat against arrest filed on 11 September 1989, the arrest of the 'Andres Bonifacio' was wrongful and an abuse of the process of the court.

The defendants sought to set aside service and all proceedings in the three in rem suits on the ground that the admiralty jurisdiction of the court had been improperly invoked against the 'Andres Bonifacio' as the defendants were not the persons liable on the various claims in an action in personam. In addition, the defendants contended that the service of the writ in Admiralty in Rem No 254 of 1989 including the execution/service of the warrant of arrest in that suit was bad in law in view of the praecipe for caveat against arrest filed on 11 September 1989.

It was disputed that the charterers of the 'Feoso Ambassador 2' and the 'Feoso Ambassador' under the relevant voyage charterparties in question were the Philippine National Oil Company ('PNOC'). The plaintiffs proceeded to arrest the 'Andres Bonifacio' on the basis that PNOC were the beneficial owners of the 'Andres Bonifacio' at the time when the three admiralty in rem suits were brought, namely, 3 October 1989. In the plaintiffs' affidavit leading to the arrest of the vessel, the plaintiffs' counsel had exhibited a copy of a certification of the Philippine Coast Guard which certified that the 'Andres Bonifacio' was, as at 30 June 1989, owned by PNOC. The Philippine Coast Guard is the registration authority for merchant vessels in the Philippines.

Counsel for both the plaintiffs and the defendants agreed and the court directed that all affidavits be filed in Admiralty in Rem No 254 of 1989 and that the three summonses-in-chambers and the defendants' motion be heard together in open court.

Held, allowing the defendants' application to set aside the writ, warrant of arrest and all proceedings in the three admiralty in rem suits:

(1) The main issue before the court was whether at the time the action in rem against the 'Andres Bonifacio' was brought, the vessel was beneficially owned by PNOC. The words 'beneficially owned' in s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) refer only to such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship.

(2) It is not sufficient for the plaintiffs to show that they have a good arguable case that PNOC and not POCI were the beneficial owners of the 'Andres Bonifacio' at the time that the action in rem was brought. Since the issue of beneficial ownership of the arrested vessel is one that goes towards establishing the jurisdiction of the court, the issue must be determined at this stage of the proceedings.

(3) The onus of showing that the 'Andres Bonifacio' is beneficially owned by PNOC (who are the persons liable in personam) lies on the plaintiffs.

(4) The information found in Lloyd's Register of Shipping which shows that the 'Andres Bonifacio' was owned from 1984 to 1989 by POCI was clearly inconsistent with the certificate of ownership issued by the Philippine Coast Guard. Additionally, before the 'Andres Bonifacio' was arrested, the plaintiffs and their solicitors had been put on notice by PNOC that they did not own the vessel.

(5) From the documentary evidence including financial statements of POCI exhibited by the defendants, the court was satisfied that PNOC transferred or assigned for value the 'Andres Bonifacio' to POCI in late October 1980. Since then, POCI have been the beneficial owners of the 'Andres Bonifacio'. POCI were registered as owners of the 'Andres Bonifacio' with the Philippine Coast Guard on 9 August 1989.

(6) The question of beneficial ownership of a vessel for the purpose of invocation of the admiralty jurisdiction of the court is to be determined by the concepts of Singapore law.

(7) Although POCI is a wholly-owned subsidiary of PNOC, under Philippine law and Singapore law, POCI and PNOC are two separate and distinct legal entities. The fact that all the shares in POCI are held by PNOC would not make PNOC the beneficial owners of the 'Andres Bonifacio'.

(8) After a consideration of all the evidence and affidavits filed by both the plaintiffs and the defendants, the court was satisfied, on the balance of probabilities, that POCI were the beneficial owners of all the shares in the 'Andres Bonifacio' from 1980 through to the date when the plaintiffs brought the action in rem against the 'Andres Bonifacio'.

(9) Accordingly, the in rem jurisdiction of the court had been wrongly invoked by the plaintiffs under s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed). Consequently, all three admiralty in rem suits, the writs and all subsequent proceedings in the three rem suits are set aside including the warrant of arrest served in Admiralty in Rem No 254 of 1989,

Cases referred to

1 *'The Permina 108'* [1977] 1 MLJ 49 (folld)
2 *'The Pangkalan Susu/Permina 3001'* [1977] 2 MLJ 129 (folld)
3 *'The I Congreso del Partido'* [1977] 1 Lloyd's Rep 536; [1978] 1 All ER 1169 (folld)
4 *'The Eschersheim'* [1976] 2 Lloyd's Rep 1; [1976] 1 All ER 920 (refd)
5 *'The Maritime Trader'* [1981] 2 Lloyd's Rep 156 (refd)
6 *Lim Bock Lai* v *Selco (Singapore) Pte Ltd* [1987] 2 MLJ 688 (refd)
7 *'The St Elefterio'* [1957] 1 Lloyd's Rep 283; [1957] 2 All ER 374 (refd)
8 *'The Blue Fruit'* [1979] 2 MLJ 279 (refd)
9 *'The Wigwam'* [1983] 1 MLJ 148 (refd)
10 *'The Aventicum'* [1978] 1 Lloyd's Rep 184 (refd)
11 *'The Saudi Prince'* [1982] 2 Lloyd's Rep 255 (refd)
12 *'The Evpo Agnic'* [1988] 2 Lloyd's Rep 411; [1988] 3 All ER 810 (refd)

Legislation referred to

High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) s 4(4)
Administration of Justice Act 1956 [UK] s 3(4)

Richard Kuek for the plaintiffs.
P Selvadurai for the defendants.

Cur Adv Vult

Karthigesu J: On 3 June 1989, Far East Oil Tanker SA as the owners of the ship or vessel 'Feoso Ambassador 2', commenced Admiralty in Rem Suit Nos 254 of 1989 and 255 of 1989 against the owners of the ship or vessel 'Andres Bonifacio' as the charterers of 'Feoso Ambassador 2'. The former suit was in relation to a 7 voyage charterparty orally concluded in January 1986 at Manila and the latter in relation to an Intertankvoy 76 charterparty dated 30 April 1985. A third Admiralty in Rem Suit No 256 of 1989 was also commenced against the owners of the ship or vessel 'Andres Bonifacio' on 3 June 1989 by the owners of the ship or vessel 'Feoso Ambassador'. The third suit was in relation to the charter of the 'Feoso Ambassador' pursuant to a charterparty dated at Manila on 23 June 1983.

The 'Andres Bonifacio' was arrested in Admiralty in Rem No 254 of 1989 on 17 October 1989. No arrests were made in the other two in rem suits which were not served. She was released on 20 October 1989 on the defendants (the owners of the ship or vessel 'Andres Bonifacio' who had entered a conditional appearance in all three in rem suits) providing bail bonds in the maximum sum of US$1,650,211.42 in respect of the In Rem Suit No 254 of 1989, the maximum sum of US$48,266.12 in the In Rem Suit No 255 of 1989 and the maximum sum of US$387,837.50 in the In Rem Suit No 256 of 1989.

On 2 November 1989 the defendants filed a summons-in-chambers in each of the three in rem suits claiming that the writ of summons issued on 3 June 1989 in that in rem suit and all subsequent steps and/or proceedings therein taken by the plaintiffs, including the service thereof, be set aside and that the bail bond furnished be cancelled or, in the event that the writ of summons is not set aside, the bail bond be reduced to such sum as the court may deem fit. The basis of these applications was that the defendants, as the beneficial owners of the 'Andres Bonifacio', were not the persons liable in personam to the plaintiffs in respect of the plaintiffs' claims either when the causes of action arose or on the dates the actions were brought by the plaintiffs, for the purposes of s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) ('the Act'). There was an additional ground in respect of the In Rem Suit No 254 of 1989, namely, that the service of the writ including the execution/service of the warrant of arrest was bad in law in view of the praecipe for caveat against arrest filed on 11 September 1989.

Also on 2 November 1989 the defendants filed a motion in the In Rem Suit No 254 of 1989 claiming that the warrant of arrest and all subsequent proceedings be set aside on the grounds that, in view of the praecipe for caveat against arrest filed on 11 September 1989, the arrest of the 'Andres Bonifacio' was wrongful and an abuse of the process of the court and further claiming that the plaintiffs pay to the defendants damages to be assessed by the registrar for the wrongful arrest and detention of the 'Andres Bonifacio' from the date of arrest until the date of release.

Counsel for both parties had agreed and the court had directed that all affidavits be filed in the In Rem Suit No 254 of 1989 and that the three summonses-in-chambers and the motion be heard together in open court. At the hearing, both Mr Richard Kuek for the plaintiffs and Mr P Selvadurai for the defendants agreed that the main issue for the determination of the court was whether PNOC Oil Carrier Inc, the defendants, to whom I shall refer hereafter as 'POCI', were the beneficial owners of the 'Andres Bonifacio' on the date these actions were brought, as on that question would depend whether or not the admiralty in rem jurisdiction of this court had been properly invoked pursuant to the provisions of s 4(4)(b) of the Act.

Counsel were also agreed on two subsidiary issues, namely, whether in view of the praecipe for caveat against arrest of the 'Andres Bonifacio' filed on 11 September 1989, the arrest was wrongful and an abuse of the process of the court and whether the failure to disclose in the affidavit leading to the issue of the warrant of arrest of the 'Andres Bonifacio', the praecipe for caveat against arrest and the reference to arbitration of the disputes or differences arising from the charterparties in question were material non-disclosures which also amounted to an abuse of process of the court.

It is not disputed that the charterers of the 'Feoso Ambassador 2' and the 'Feoso Ambassador' under the charterparties in question were the Philippine National Oil Company (PNOC). The plaintiffs proceeded to arrest the 'Andres Bonifacio' on the basis that PNOC were her beneficial owners at the time when these actions were brought, namely, 3 October 1989. In the affidavit leading to the arrest of the 'Andres Bonifacio' filed in the In Rem Suit No 254 of 1989 on 17 October 1989, the deponent, the plaintiffs' counsel, said at para 5:

> This action is brought by the plaintiffs pursuant to s 4 of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed). To the best of my knowledge and belief the defendants who are the persons liable in personam, were when the cause of action arose, the charterers of the 'Feoso Ambassador 2' in connection with which this claim arose and were also, at the time of the issue of the writ, the beneficial owners of all the shares in the 'Andres Bonifacio' against which this action is brought. The grounds of my belief is that according to the instructions I received from Ince & Co, the plaintiffs' Hong Kong solicitors, the defendants are the Philippine National Oil Company and the owners of the 'Andres Bonifacio' are, as at the date of the time of the issue of the writ, the Philippine National Oil Company. There is now produced and shown to me exhibit marked 'RK-1' being a true copy of a certification of the Philippine Coast Guard to the effect that the 'Andres Bonifacio' is owned by the Philippine National Oil Company.

The exhibit referred to is dated 30 June 1989 and does certify that the 'Andres Bonifacio' is owned by PNOC. It is admitted that the Philippine Coast Guard is the registration authority of merchant vessels in the Philippines.

The interpretation or construction of s 4(4) of the Act is now well settled by authority both in Singapore and in England. In *'The Permina 108'*[1] at p 50 (second column, letter G) Wee Chong Jin CJ delivering the judgment of the Court of Appeal said:

> In our judgment, on the true construction of s 4(4) of the Act, a ship to be liable to arrest must be:
>
> (a) The ship in connection with which the claim [being a claim under paras (d) to (q) of s 3(1)] made in the action arose, if at the time when the action is brought it is the property of the defendant to the action, the defendant being the person who would be liable on the claim in an action in personam and who was either the owner or charterer of or in possession or in control of, the ship, at the time when the cause of action arose; or
>
> (b) Any other ship which, at the time when the action is brought, is the property of the person liable in personam and who, at the time when the cause of action arose, was either the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose.

In *'The Pangkalan Susu/Permina 3001'*[2] at p 130 (first column, letter H) Wee Chong Jin CJ delivering the judgment of the Court of Appeal dealt with the meaning of the words 'beneficially owned' in the context of the Act as follows:

> The question is what do the words beneficially owned as respects all the shares 'therein' mean in the context of the Act. These words are not defined in the Act. Apart from authority, we would construe them to refer only to such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship. Our construction would clearly cover the case of a ship owned by a person who, whether he is the legal owner or not, is in any case the equitable owner of all the shares therein. It would not, in our opinion, cover the case of a ship which is in the full possession and control of a person who is not also the equitable owner of all the shares therein. In our opinion, it would be a misuse of language to equate full possession and control of a ship with beneficial ownership as respects all the shares in a ship. The word 'ownership' connotes title, legal or equitable whereas the expression 'possession and control', however full and complete is not related to title. Although a person with only full possession and control of a ship, such as a demise charterer, has the *beneficial* use of her, in our opinion he does not have the beneficial ownership as respects all the shares in the ship and the ship is not 'beneficially owned as respects all the shares therein' by him within the meaning of s 4(4).

In *'The I Congreso del Partido'*[3] Robert Goff J (as he then was) said in relation to s 3(4) of the Administration of Justice Act 1956 [UK], which is the equivalent provision to s 4(4) of the Act, at p 560 (second column):

> I start with the statute, and the words with which I am particularly concerned, and which I have to construe in the context of the statute, are 'beneficially owned as respects all the shares therein'. In my judgment, the natural and ordinary meaning of these words is that they refer only to such ownership as is vested in a person who, whether or not he is the legal owner of the vessel, is in any case the equitable owner ...

then at p 561 (second column) he said:

> ... s 3(4) of the Act is concerned with title, the word 'beneficial' being introduced to allow for the peculiar English institution of the trust.

and finally at p 563 (second column) he said:

> As I read s 3(4), the intention of Parliament in adding the word 'beneficially' before the word 'owned' in s 3(4) was simply to take account of the institutions of the trust, thus ensuring that, if a ship was to be operated under the cloak of a trust, those interested in the ship would not thereby be able to avoid the arrest of the ship.

For the sake of completeness I would note that it was not argued before me that the 'Andres Bonifacio' could not be arrested in these in rem proceedings because she was not the 'sister ship' of the 'Feoso Ambassador 2' or the 'Feoso Ambassador ' in line with the dictum of Lord Diplock in *'The Eschersheim'*[4] which Sheen J felt obliged to follow in *'The Maritime Trader'*.[5] The Singapore position is as stated by Wee Chong Jin CJ in *'The Permina 108'*.[1] See his reason for not following *'The Eschersheim'*[4] at p 51 of the report of *'The Permina 108'*.[1]

What I have to decide is whether, on a full investigation of all the facts put before me on the hearing of this motion, it has been shown that when these actions were brought on 3 June 1989 the 'Andres Bonifacio' was beneficially owned by POCI. If she was beneficially owned by POCI then the plaintiffs have not properly invoked the in rem jurisdiction of this court under s 4(4) of the Act and the writ, the warrant of arrest and all subsequent proceedings must be set aside.

It was suggested by Mr Richard Kuek that at this stage of the proceedings, on a good arguable case being made out on a balance of probabilities that PNOC and not POCI were the beneficial owners of the 'Andres Bonifacio', the court should not set aside the writ, the warrant of arrest and all subsequent proceedings for want of jurisdiction but should 'leave the door open' so to speak for the matter to be dealt with at the trial. In support of this proposition he cited *Lim Bock Lai* v *Selco (Singapore) Pte Ltd*,[6] *'The St Elefterio'*,[7] *'The Blue Fruit'*,[8] and *'The Wigwam'*.[9]

I do not agree. These cases are not in point. They did not deal with jurisdiction. The true position was stated by Goff J in *'The I Congreso del Partido'*[3] at p 558 of the report as follows:

> Jurisdiction in admiralty actions is statutory, as is defined by the Administration of Justice Act 1956. Section 3 of the Act (our s 4) lays down the circumstances in which an action in rem may be brought: if the case is not within the section, then the court has no jurisdiction in respect of an action in rem, and the writ and all subsequent proceedings should be set aside. ... It follows as a matter of principle that any question of jurisdiction, such as the question in the present motions, must be dealt with on the motions, and cannot be dealt with as an issue in the actions. ... On the evidence so admitted, which in the present case is purely affidavit evidence, the question of jurisdiction has to be decided, and it cannot be right for the decision on that question to be allowed to depend on the decision of some issue to be tried in the actions. ... ; indeed it cannot be decided whether the actions can be allowed to proceed until the question of jurisdiction had been determined.

The position as stated by Goff J was followed in the later cases of *'The Aventicum'*,[10] *'The Maritime Trader'*[5] and *'The Saudi Prince'*.[11] In *'The Aventicum'*,[10] at p 187 of the report second column Slynn J said:

> I have no doubt that on a motion of this kind it is right to investigate the true beneficial ownership. I reject any suggestion that it is impossible 'to pierce the corporate veil'. I of course remember, as Mr Howard urges, the case of *Salomon* v *Salomon & Co* [1897] AC 22, but of course it is plain that s 3(4) of the Act [our s 4(4)] intends that the court shall not be limited to a consideration of who is the registered owner or who is the person having legal ownership of the shares in the ship; the directions are to look at the beneficial ownership.

At p 186 he said:

> I have come to the conclusion that on this motion the onus is upon the plaintiffs to show that the person against whom it is sought to invoke the admiralty jurisdiction is the person who beneficially owns all shares and that he is the same person who was the owner at the time the cause of action arose.

These two passages were cited with approval by Sheen J in *'The Maritime Trader'*[5] (at p 157, second column of report) and in *'The Saudi Prince'*[11] (at p 266, first column of report).

I accept that the onus of showing that the 'Andres Bonifacio' is beneficially owned by PNOC, who are the persons liable in personam, and not by POCI, is on the plaintiffs who have sought to invoke the in rem jurisdiction in these actions pursuant to s 4(4) of the Act. Although I did not accede to Mr Selvadurai's application that the plaintiffs should begin, I am not to be taken as having displaced the onus of proof which lay on the plaintiffs. In my view, since all the evidence was contained in the affidavits before the court, it was convenient that he who had taken out the motion should begin. This was not a trial within the meaning of O 38 of The Rules of the Supreme Court 1970.

I shall now investigate into the facts, bearing in mind the powerful judicial views I have set out above on the meaning of 'beneficial ownership' in the context of s 4(4) of the Act and the manner in which that question ought to be investigated.

At the hearing, the plaintiffs justified the commencement of the in rem proceedings against the 'Andres Bonifacio' and her arrest in the In Rem Suit No 254 of 1989 on the ground that PNOC, the persons liable in personam to the plaintiffs under the charterparties in question, were not only the registered owners of the 'Andres Bonifacio' at the date when the in rem actions were brought but were also the beneficial owners as respects all the shares in her. They placed reliance on the certification of the Philippine Coast Guard, exhibited to the affidavit leading to the issue of the warrant of arrest, to which I have already referred, and the affidavit evidence of Anacleto M Diaz, a Philippine lawyer, commenting on the affidavits filed on behalf of the defendants and the documents exhibited therein. The plaintiffs also rely on the registration of a vessel named 'Gregorio del Pilar' in the name of PNOC and the purported sale by PNOC of the 'Andres Bonifacio' as evidence that POCI could not be the beneficial owner of the 'Andres Bonifacio'.

Before I unfold the picture that emerges from the documents exhibited in the affidavits filed by both sides on the question of the ownership of the 'Andres Bonifacio', it is pertinent to refer to some of the correspondence exchanged between the plaintiffs' and the defendants' solicitors which have been exhibited.

It is evident that the disputes between the plaintiffs and the defendants on the charterparties in question were of long standing. Some of them had been referred to arbitration in London from time to time. In 1988 the plaintiffs commenced seven admiralty in rem actions against the owners of the 'Andres Bonifacio'. None of them were served and the writs were allowed to lapse. However there were discussions between the plaintiffs' Hong Kong solicitors and the defendants' Hong Kong solicitors as to the venue for the arbitration in the event the current disputes were referred to arbitration, the provision of security and the possible arrest of the 'Andres Bonifacio'. In the last connection the defendants' Hong Kong solicitors informed the plaintiffs' Hong Kong solicitors on 16 August 1988 that the plaintiffs had no basis for arresting the 'Andres Bonifacio'. They followed this up on 17 August 1988 with a fax message which contained the following paragraph:

> We have not seen copies of any of the charterparties or other contractual documents upon which your clients rely. To date we have been proceeding on the assumption that the owners of the 'Andres Bonifacio' were the charterers under the charterparties to which you have referred dated 23 June 1983 and 30 April 1985 and further, that they were the party to whatever contract may have existed between our respective clients in January 1986. We note from Lloyd's Register of Shipping that the 'Andres Bonifacio' is owned by PNOC Oil Carriers Inc (ie POCI) and at the time of dictating this message we are seeking confirmation from our clients that it was this company that was, indeed, the party to the abovementioned agreements. If the position is otherwise then there would appear to be no right of arrest in any event. Our clients' position in this regard is reserved.

The reference to Lloyd's Register of Shipping in my view is most significant. No shipping lawyer can be without it as it provides ready information as to the ownership of vessels and, although total reliance cannot be placed on the information it contains, it cannot also be ignored. In my view any divergence in the information contained in the Lloyd's Register of Shipping and that obtained from the vessel's port of registry needs to be further investigated to ascertain the true *beneficial ownership* before proceeding in rem in a jurisdiction such as ours. This case is such a case. The information contained in the Lloyd's Register of Shipping shows that the owners of 'Andres Bonifacio' for the years 1982 and 1983 were PNOC and from 1984 to 1989, POCI. The information obtained from the port of registry is that the certificate of Philippine Register and the certificate of ownership both issued on 29 March 1984 show that the 'Andres Bonifacio' was owned by PNOC as at the date of certification on 30 June 1989.

Two further letters need to be referred to. On 19 June 1989, after the commencement of these in rem proceedings and before the arrest of the 'Andres Bonifacio', the defendants' Singapore solicitors wrote to the plaintiffs' Singapore solicitors inquiring of their basis for invoking the admiralty jurisdiction against the owners of the 'Andres Bonifacio' since the plaintiffs' cause of action was against PNOC and since PNOC were not the owners of the 'Andres Bonifacio'. This letter was followed up by a letter from the defendants' Hong Kong solicitors to the plaintiffs' Hong Kong solicitors on 28 June 1989 in which the defendants' Hong Kong solicitors said:

> We understand from our client's solicitors in Singapore that your clients are contemplating a possible arrest of the 'Andres Bonifacio'. We have been asked to draw your attention to the fact that PNOC do not own the vessel nor did they own her at any material time in the past.

I have referred to these letters as it seems to me that the plaintiffs and their solicitors both in Hong Kong and Singapore were clearly put on notice before the 'Andres Bonifacio' was arrested in the In Rem Suit No 254 of 1989 that she was not owned by PNOC but by POCI and, despite clear judicial authority that s 4(4) of the Act intends a consideration not of who is the registered owner or who is the person having legal ownership of the shares in her but who is her beneficial owner (see the authorities cited above), chose to rely solely on the certificate of the Philippine Coast Guard to the effect that the 'Andres Bonifacio' was owned by PNOC without any further investigation (see para 5 of the affidavit leading to the issue of the warrant of arrest I have set out earlier in this judgment).

Be that as it may, what emerges from the documents exhibited by the defendants is that in 1980, PNOC which is a Philippine government-owned corporation and which had been responsible for the country's entire shipping and oil exploration activities since about 1975, decided in accordance with its policy of diversification to set up a number of wholly owned subsidiaries. Accordingly, on 23 October 1980 PNOC resolved that all contracts, assets and liabilities of PNOC pertaining to energy drilling and energy supply base operations be assigned to PNOC Energy Drilling Inc and PNOC Energy Supply Base Inc respectively upon their incorporation. Further PNOC resolved that all contracts, assets and liabilities pertaining to PNOC's shipping operations be assigned to PNOC Petroleum Tanker Inc (PPTI) and PNOC Oil Carriers Inc (POCI) respectively, effective upon their incorporation and covering transactions as of May 1979 for PPTI and April 1980 for POCI.

In anticipation of the above, the 'Andres Bonifacio' a 'VLCC' then known as 'World Joy' had been purchased by PNOC for US$26m and arrived in Philippine waters on 14 April 1980. From the time POCI's incorporation formalities were completed in September 1980, POCI operated the 'Andres Bonifacio', incurred the expenses and assumed the liabilities for her acquisition. These are borne out by the financial statements of POCI for the years 1980 to 1989. In fact the notes to the financial statements for the years 1980 and 1981, inter alia, read as follows:

1 General

On 2 April 1980, Philippine National Oil Company (PNOC) acquired the oil tanker 'Andres Bonifacio'. In accordance with the original plan, the vessel together with its related costs, revenues and expenses were transferred to the company (PNOC Oil Carriers, Inc) (POCI) which was organized and incorporated primarily to own and operate the oil tanker.

The company's incorporation papers were filed with the Securities and Exchange Commission on 16 May 1980 and approved on 9 September 1980.

The board of directors approved and confirmed the assignment of all contracts, assets and liabilities pertaining to the operations of the tanker 'Andres Bonifacio' from 2 April 1980 up to the date of incorporation.

Notwithstanding that the 'Andres Bonifacio' had been assigned to and possession taken by POCI following the resolution of PNOC of 23 October 1980 and the due incorporation of POCI on 9 September 1980 who then assumed the acquisition cost and the operating expenses of the 'Andres Bonifacio' she remained registered in the name of PNOC with the Philippine Coast Guard. It was explained to me by reference to the balance sheet for the year ended 31 December 1980 that the only asset of POCI is shown as 'oil tanker PHP 203,707,101'. I was also furnished with a letter from the Philippine National Bank, Singapore branch, dated 31 January 1991 which certified that the guiding rate (mid-rate) of exchange between 22 December and 31 December 1980 was PHP 7.60 to US$1. Applying this rate to the price paid by PNOC for the purchase of the 'Andres Bonifacio' in April 1980 the resultant is PHP 197,600,000. I was further informed that the cost of acquisition of the 'Andres Bonifacio' to POCI was paid to PNOC by paying off that proportion of PNOC's syndicated Japanese yen loan which represented the liabilities which POCI accepted from PNOC in respect of the 'Andres Bonifacio'. The notes in the financial statement of POCI for the year ended 31 December 1981, inter alia, read as follows:

4 Long-Term Debt

The long-term debt represents the loan obtained from PNOC out of the proceeds of PNOC's syndicated Japanese yen loan. The company (POCI) agrees to reimburse PNOC, in proportion to its share of the loan, any and all instalments of principal and interest at due dates of the loan, plus all related expenses which PNOC may incur until said loan is fully liquidated.

In accordance with the new agreement with PNOC, the amount of PHP 204,310,052 shown in 1980 as 'Due from/to affiliated companies' was reclassified to 'Long-term debt' to conform with the 1981 presentation.

The authenticity of these financial statements cannot be doubted in my view as they were subject to independent audit by outside auditors. It seems clear to me that 'Andres Bonifacio' was transferred or assigned to POCI by PNOC for value on POCI being incorporated on 9 September 1980, pursuant to PNOC's resolution passed on 23 October 1980.

I have referred earlier to the registration of the 'Gregorio del Pilar' in the name of PNOC and the purported sale of the 'Andres Bonifacio' by PNOC. Reference was made to these two events by the plaintiffs in an endeavour to show by the former, that PNOC owned another vessel apart from the 'Andres Bonifacio' and by the latter, that it was PNOC who was exercising a right of sale in respect of the 'Andres Bonifacio' and thus it must follow that the beneficial ownership of the 'Andres Bonifacio' was with PNOC and with no other.

Apart from exhibiting the certificate of the Philippine Coast Guard dated 30 May 1990 which certifies that the 'Gregorio del Pilar' was registered in the name of PNOC on 29 March 1984 and that the vessel's Philippine registry was deleted on 13 April 1988 no comment was made by the plaintiffs. It is evident that the 'Gregorio del Pilar' was sold, hence the deletion of the Philippine registry. What is important to note is that the sale is reflected in the financial statements of POCI for it is found in the statements of income and deficit for the year ended 31 December 1988 that a sum of PHP 74,871,571 is credited in the accounts of POCI against the entry 'Gain on sale of Gregorio del Pilar'. This can only mean that although the 'Gregorio del Pilar' was registered in the name of PNOC, she was beneficially owned by POCI.

The purported sale of the 'Andres Bonifacio' is referred to extensively by Anacleto M Diaz in his affidavit filed on behalf of the plaintiffs on 7 May 1990. He deposes that PNOC advertised the sale through a sealed bid of the 'Andres Bonifacio' which contained a statement which read:

PNOC reserves the right to reject any or all bids to waive any formalities therein or to accept such bids as may be disadvantageous to PNOC.

Following the receipt of the bid, PNOC entered into the memorandum of agreement with the buyer. When the Philippine Commission on Audit nullified the sale on the ground that there was a failure of bidding since there was only one bidder, PNOC made representations to the Commission on Audit where they referred to the

'Andres Bonifacio' as a 'PNOC vessel'. In communications with the buyer after the sale was nullified PNOC explained the nullification to the buyer in the following manner:

> ... existing government policy as well as the disposal rules approved by our board do not allow PNOC to accept the terms and conditions under which you have offered to buy the tanker ...

When the buyer sued PNOC and pleaded in the 'complaint' that the 'defendant (PNOC) is the owner and operator of T/T Andres Bonifacio ...', PNOC did not demur.

All this, Mr Diaz argued in his affidavit and Mr Kwek submitted, meant that PNOC were both the registered and beneficial owner. In fact he argued that the concept of beneficial owner was not known or recognized in Philippine law. I will return to the concept of beneficial ownership in Philippine law later but surely the matters relied on by Mr Diaz do no more than confirm that the registered title of the 'Andres Bonifacio' was in PNOC and that they were putting up her sale as the registered title holder. The matters relied on by Mr Diaz do not address the question of beneficial ownership.

However POCI's financial statements once again throw light on the matter. Note 7 to the financial statement for the year ended 31 December 1988 reads as follows:

> Others
>
> The company (POCI) sold one of its tankers, TT Gregorio del Pilar, for P152,980,000 (US$7,300,000) on 12 April 1988 to Milton Holdings Limited, Liberia.
>
> The company's (POCI) major asset, the tanker 'Andres Bonifacio', was offered for sale through public bidding in September 1988 and was awarded to a lone complying bidder. The award was subject to approval by appropriate government authorities. The Commission on Audit disapproved the award and considered the bidding a failure on the ground that there was only bidder. The bidder filed an action in court to enforce the sale and litigation is currently in progress.

Following the failed bid to sell the 'Andres Bonifacio' in September 1988, steps were taken to formalize the assignment of the 'Andres Bonifacio' from PNOC to POCI and a deed of assignment was executed on 20 July 1989. The deed of assignment recites the resolution of PNOC of 23 October 1980, the purchase of the 'Andres Bonifacio' by PNOC, the incorporation of POCI and the actual assignment transfer and conveyance of the 'Andres Bonifacio' to POCI on 2 April 1980. Subsequently on 9 August 1989, POCI were entered as the registered owners of the 'Andres Bonifacio' with the Philippine Coast Guard.

Mr Diaz as an expert on Philippine law, has expressed the view in his two affidavits, the second was filed on 10 January 1991, that as the PNOC resolution of 23 October 1980 does not show that POCI consented to or accepted the assignment of the 'Andres Bonifacio' the resolution of 23 October 1980 was ineffective under Philippine law to operate as an assignment. Further, he took the view that as the assignment was of all the contracts, assets and liabilities of PNOC's shipping operations covering transactions as of April 1980 and as POCI was not incorporated until 9 September 1980, the purported assignment was to a non-existent company and this too made the assignment ineffective under Philippine law. Perhaps Mr Diaz has overlooked the words 'effective upon the incorporation of said assignee subsidiaries' in the PNOC resolution of 23 October 1980. These words refer to the incorporation of PPTI and POCI.

However, the defendants' expert on Philippine law, Valeriano R Del Rosario, whose legal experience is not confined to the Philippines alone as he holds a Masters Degree in Marine Law and Policy obtained from the University of Wales of Science and Technology at Cardiff, Wales in 1983 and who practised as a legal assistant from 1983 to 1986 in the English law firm of Messrs Sinclair Roche & Temperly in London, took a different view. His views expressed in his two affidavits filed on behalf of the defendants on 7 December 1990 and 30 January 1991 respectively, is that:

> the transfer of the 'Andres Bonifacio' by way of assignment from PNOC to POCI in 1980 was valid as far as the parties were concerned because the essential requisites of a contract were present (art 1319 of the Civil Code of the Philippines):
>
> (i) There was consent by the parties. The PNOC board of directors approved on 23 of October 1980 the assignment of PNOC's shipping operations to POCI. POCI manifested its acceptance of the assignment by taking delivery and operating the 'Andres Bonifacio'.
> (ii) The object of the assignment was the 'Andres Bonifacio'.
> (iii) There was consideration for the assignment by and between PNOC and POCI. In consideration for the transfer of 'Andres Bonifacio', POCI assumed the liabilities for the ship which included a substantial long term debt, which can be seen from the documents in exh VRR-1 (the POCI financial statements) (para 17 of his affidavit filed on 7 December 1990).

Mr Del Rosario then concludes that as between PNOC and POCI, POCI became the beneficial owners of the 'Andres Bonifacio' in 1980.

I accept the expert evidence of Mr Del Rosario because it is not only manifestly correct but also because it accords with the principles of our law. I have to determine the question of beneficial ownership not by the concepts of Philippine law but by Singapore law.

It is not the defendants' case that the ownership or the beneficial ownership of the 'Andres Bonifacio' was

transferred to POCI only by reason of the deed of assignment executed on 20 July 1989. I do not therefore propose to dwell on it. Suffice it to say that Mr Diaz concedes that it could take effect but only on 9 August 1989, when POCI were registered as the owners of the 'Andres Bonifacio' with the Philippine Coast Guard. On the other hand Mr Del Rosario contends that the deed of assignment dated 20 July 1989 was valid because it merely contained the terms of the agreement in 1980 between PNOC and POCI. It is correct that with the registration on 9 August 1989, POCI also became the registered owners of the 'Andres Bonifacio'. Again I find myself in agreement with Mr Del Rosario.

It is accepted by both sides that POCI is a wholly owned subsidiary of PNOC. Under Philippine law (see para 20 of Del Rosario's affidavit filed on 7 December 1990) as well as under our law, PNOC and POCI are two separate and distinct legal entities. The fact that all the shares in POCI are held by PNOC would not make PNOC the beneficial owner of 'Andres Bonifacio'. Shareholders are not owners of the assets of the company. See *'The Evpo Agnic'*[12] at p 413.

Finally, a veiled suggestion was made by counsel for the plaintiffs that the whole of the defendants' case was a 'strange story' and a 'massive deception'. Quite rightly these suggestions were not pursued. I find no substance in this at all. There was nothing clandestine or underhand in the dealings between PNOC and POCI, firstly, in the transfer of the beneficial ownership in 1980 and secondly, in the registration of the 'Andres Bonifacio' in the name of POCI in 1989.

The plaintiffs' case that PNOC were the beneficial owners of the 'Andres Bonifacio' from 1980 through to 1989 and at the date of the commencement of these in rem proceedings was built around the expert evidence of Mr Diaz on Philippine law. His opinions were addressed to the question of who was the legal and registered owner of the 'Andres Bonifacio' and not to who were the 'real owners' as Mr Del Rosario had done. Therein lies the reason for the divergence of opinion expressed by the two experts.

Having considered all the evidence that was placed before me in the several affidavits filed by both sides, I have come to the conclusion that the plaintiffs have failed to satisfy me that PNOC were the beneficial owners of the 'Andres Bonifacio' when these in rem actions were brought. On the balance of probabilities, I am satisfied that POCI were the beneficial owners of all the shares in the 'Andres Bonifacio' from 1980 through to the date when these in rem proceedings were commenced.

Accordingly the in rem jurisdiction of this court has been wrongly invoked by the plaintiffs under s 4(4) of the Act in all three suits and the writs and all subsequent proceedings in the In Rem Suit Nos 254, 255 and 256 of 1989 must be set aside including the warrant of arrest in the In Rem Suit No 254 of 1989 and the bail bonds provided by the defendants in each of the In Rem Suit Nos 254, 255 and 256 of 1989 be taken off the file and handed to M/s Rodyk & Davidson, the solicitors for the defendants. The defendants are entitled to the costs of the three summonses in the three in rem suits as well as on the motion in the In Rem Suit No 254 of 1989 which shall be taxed and paid to them.

During the course of the hearing, defendants' counsel accepted the reasons given by plaintiffs' counsel for not referring to the praecipe for caveat against arrest filed on 11 September 1989 in the affidavit leading to the issue of the warrant of arrest of the 'Andres Bonifacio' and for arresting the 'Andres Bonifacio' despite the praecipe for caveat against arrest. Thus the remaining subsidiary issue was whether the warrant of arrest ought to be set aside on the ground that the references to arbitration had not been referred to in the affidavit leading to the warrant of arrest.

There was no clear evidence whether the disputes arising out of the oral, 7 voyage charterparty concluded in January 1986, the subject matter of the In Rem Suit No 254 of 1989, in which the 'Andres Bonifacio' was arrested, had been referred to arbitration. In the circumstances I do not consider it proper to express a view on this question.

There still remains the prayer in the motion in the In Rem Suit No 254 of 1989 for damages to be assessed by the registrar for the wrongful arrest and detention of the 'Andres Bonifacio' from the date of arrest until the date of release. It was agreed that this prayer was consequential on my decision on the motion. In view of the conclusion I have arrived at, the defendants have liberty to restore the motion for this question to be dealt with if they are so advised.

Order accordingly.

Solicitors: *Gurbani & Co; Rodyk & Davidson.*

Reported by *David Chong Gek Sian*